Razali bin Samani v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–110 OF 2007
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
29 SEPTEMBER 2010

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — 888.56g of cannabis — Appeal against conviction and sentence — Drugs found in accused car — Accused claiming that drugs brought into car by another person — Whether existence of other person proven — Whether defence raised reasonable doubt on prosecution's case — Statutory presumption of trafficking under s 37(da) — Whether conviction safe

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Criminal Procedure — Charge — Defective charge — Error in date of commission of offence — Whether error occasioned failure of justice — Whether sufficient evidence to warrant conviction

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Acting on information received PW4 led a police party to lay an ambush at Kempas Toll Plaza towards Senai. They arrived there at about 10.30pm. Half an hour later the suspect car arrived and was parked near the public toilet. PW4 and the members of the raiding team approached the said car. The appellant was alone in the car. PW6 then found the cannabis in a package in the car and the appellant was arrested. The appellant was charged with an offence of trafficking in 888.56g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The learned trial judge found that the prosecution had proved actual possession against the appellant without the aid of the presumption under s 37(d) of the DDA. The learned trial judge then invoked the statutory presumption of trafficking under s 37(da) of the DDA against the appellant. The appellant, in his defence, claimed that at the time of his arrest there was another person by the name of Mohd Izuan in the car and it was Mohd Izuan who brought in the drugs into the car. According to the appellant on that day he gave a lift to Mohd Izuan and Mohd Izuan had brought the package into the car claiming it to be a cake. The appellant further claimed that Mohd Izuan had asked the appellant to stop at the Kempas Toll Plaza and had got out to use the toilet. The learned trial judge held that the defence was an afterthought which did not raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death. Hence this appeal.

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Held, dismissing the appeal:

(1) The raiding party arrived at the Kempas Toll Plaza car park at about

10.35pm and took their position near the public toilet of the Kempas Toll Plaza. The appellant arrived there later at about 11pm. So if Mohd Izuan was present PW4 could have seen him as the place was under his surveillance (see para 18).

(2) The learned trial judge had carefully and properly analysed all the available evidence presented by the defence and made specific findings of fact. The findings of the learned trial judge were based on essentially questions of fact and there was no reason to disturb the findings. The defence had failed to raise any reasonable doubt that the appellant was in possession of the cannabis found under the driver's seat of his car. The appellant had not also rebutted the statutory presumption of trafficking in the said drugs (see para 19).

(3) In the charge the offence was alleged to have taken place on 20 February 2004. However, the evidence showed that the offence and the arrest took place on 19 February 2004. The error in the charge against the appellant had not occasioned a failure of justice. There was sufficient evidence to warrant the conviction. In a criminal case the duty of the court is to consider whether the conviction is right (see para 20); *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409 referred.

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima PW4 mengetuai pasukan polis untuk menyerang hendap di Plaza Tol Kempas menghala Senai. Mereka tiba di sana pada kira-kira pukul 10.30 malam. Setengah jam kemudian kereta suspek tiba dan meletakkan kereta berdekatan tandas awam. PW4 dan ahli-ahli pasukan menyerbu mendekati kereta tersebut. Perayu bersendirian di dalam kereta tersebut. PW6 kemudiannya mendapati kanabis dalam paket di dalam kereta dan perayu ditangkap. Perayu dituduh dengan kesalahan mengedar dadah kanabis seberat 888.56g di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan yang bijaksana mendapati bahawa pendakwaan telah membuktikan milikan sebenar terhadap perayu tanpa bantuan anggapan di bawah s 37(d) ADB. Hakim perbicaraan yang bijaksana kemudiannya membangkitkan anggapan statutori pengedaran di bawah s 37(da) ADB terhadap perayu. Perayu, dalam pembelaannya, menuntut bahawa pada masa penangkapannya terdapat seorang lagi yang bernama Mohd Izuan di dalam kereta dan bahawa Mohd Izuan yang membawa dadah ke dalam kereta. Menurut perayu pada hari tersebut dia menumpangkan Mohd Izuan dan Mohd Izuan membawa paket tersebut ke dalam kereta dengan mendakwa yang ianya adalah kek. Perayu selanjutnya mendakwa bahawa Mohd Izuan telah menyuruh perayu berhenti di Tol Plaza Kempas dan keluar untuk menggunakan tandas. Hakim perbicaraan yang bijaksana memutuskan bahawa pembelaan tersebut adalah sesuatu yang difikirkan semula yang tidak

membangkitkan keraguan munasabah atas kes pendakwaan. Perayu oleh itu disabitkan dan dihukum mati. Maka rayuan ini.

Diputuskan, menolak rayuan:

(1) Pasukan menyerbu tersebut tiba di tempat letak kereta Plaza Tol Kempas pada kira-kira pukul 10.35 malam dan mengambil tempat mereka berdekatan tandas awam Plaza Tol Kempas. Perayu tiba di sana kemudiannya pada kira-kira pukul 11 malam. Oleh itu jika Mohd Izuan ada di situ PW4 boleh nampak dia kerana tempat tersebut di bawah pengawasannya (lihat perenggan 18).

(2) Hakim perbicaraan yang bijaksana telah dengan teliti dan betul menganalis kesemua keterangan yang ada yang diserahkan oleh pembelaan dan membuat dapatan fakta spesifik. Dapatan hakim perbicaraan yang bijaksana adalah berdasarkan atas persoalan fakta pada asasnya dan tidak ada sebab untuk campur tangan dapatan tersebut. Pembelaan telah gagal untuk membangkitkan apa-apa keraguan munasabah bahawa perayu memiliki kanabis yang dijumpai di bawah tempat duduk pemandu keretanya. Perayu juga tidak mematahkan anggapan statutori pengedaran dadah tersebut (lihat perenggan 19).

(3) Dalam tuduhan kesalahan didakwa mengambil tempat pada 20 Februari 2004. Walau bagaimanapun, keterangan menunjukkan bahawa kesalahan dan penangkapan mengambil tempat pada 19 Februari 2004. Kesilapan dalam tuduhan terhadap perayu tidak menyebabkan kegagalan keadilan. Terdapat keterangan memadai untuk mewajarkan sabitan. Dalam kes jenayah tugas mahkamah adalah untuk mempertimbangkan sama ada sabitan adalah betul (lihat perenggan 20); *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409 dirujuk.]

Notes

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1178–1213.

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)

Lai Kim Hon & Ors v PP (see note at [1980] 2 MLJ x) [1981] 1 MLJ 84, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)

PP v Mohamed Ali [1962] MLJ 257 (refd)

A *Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a)

B **Appeal from**: Criminal Trial No MT(1)45–11 of 2005 (High Court, Johor Bahru)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney

C *General's Chambers) for the respondent.*

Hasan Lah JCA (delivering judgment of the court):

INTRODUCTION

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[1] The appellant was charged and tried before the Johor Bahru High Court for trafficking in 888.56g of cannabis. He was convicted and sentenced to death hence this appeal.

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[2] On 4 January 2010 we dismissed his appeal. We now give the grounds for our decision.

THE PROSECUTION'S CASE

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[3] The charge against the appellant is as follows:

> Bahawa kamu pada 20.2.2004, jam lebih kurang 11.00 malam di Plaza Tol Kempas menghala ke Senai dalam Daerah Johor Bahru, Dalam Negeri Johor telah didapati
G mengedar dadah berbahaya iaitu 886.56 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] The brief facts of the case for the prosecution as found by the learned trial
H judge are as follows. On 19 February 2004 acting on information received PW4 (C/Insp Sekam a/l Anoi) led a police party to lay an ambush at Kempas Toll Plaza towards Senai. They arrived there at about 10.30pm. Half an hour later the suspect car, a green Proton Wira No JEM 9286, arrived there and the said car was parked near the public toilet. SP4, together with members of the
I raiding team, approached the said car. SP4 then went to the driver's side, knocked on the glass window and when the driver, subsequently identified as the appellant, wound down the window, SP4 immediately switched off the car engine and then seized the ignition key. The appellant was alone in the car. SP4 then identified himself and asked the appellant to come out of the car.

[5] Inside the car PW6 (L/Kpl Mohd Zin bin Derus) recovered a compressed slab wrapped in aluminium foil and he then handed it to PW4. PW4 also said that he detected the smell of cannabis. The appellant was arrested.

[6] PW5 (Zulkifli bin Jamal), who is the brother-in-law of the appellant, testified that although the car was registered under his name the car belonged to the appellant. PW5 merely lent his name to assist the appellant to finance the car. The appellant had been using the car.

[7] PW3 (Soupy Daud), the government chemist, testified that the nett weight of the cannabis was 886.56g.

THE DEFENCE CASE

[8] The appellant gave a statement from the dock. In essence, the appellant stated that at the time of his arrest there was another person by the name of Mohd Izuan bin Mohd Tamen ('Mohd Izuan') in the car and it was Mohd Izuan who brought in the offending drugs into the car.

According to the appellant on that day he gave a lift to Mohd Izuan from Pasir Gudang as Mohd Izuan wanted to go back to Senai. When Mohd Izuan got into his car the appellant saw Mohd Izuan bringing into the car a package which was wrapped with a piece of cloth. The appellant asked him what it was and the latter replied that it was cake to be brought home. The appellant said he then saw Mohd Izuan put it on to the back seat. Thereafter he went to SD2's (Abd Rahim Omar) house to pick up his bag of clothes.

[9] After that the appellant proceeded towards the direction of Kulai using the highway. About 5km before the Kempas Toll Plaza, Mohd Izuan asked the appellant to stop at the Kempas Toll Plaza as he wanted to use the toilet. After the appellant parked his car at the Kempas Toll Plaza, Mohd Izuan hurriedly got out of the car to go to the toilet. The appellant then also got out to smoke beside the driver's door while waiting for Mohd Izuan. Then the appellant saw a car drove by and parked behind his car. The occupants of the said car, whom he came to know as police later, arrested him. He was then handcuffed. The appellant protested his innocence as regards the cannabis found under the driver's seat. The appellant told SP4 that it was Mohd Izuan's. The appellant disputed the prosecution version that he was alone in the car.

[10] To support his unsworn statement the appellant relied on the evidence of his five witnesses. They were his brother-in-law Abdul Rahim bin Omar ('DW2'), his wife Zuraidawati bt Jamil ('DW3'), Sjn Rosli bin Bachok ('DW4'), his neighbour Mohd Zaidi bin Mohd Radzi ('DW5') and ex-fiancee of the appellant's wife brother Puteri Farahliza bt Mohd Noh ('DW6').

[11] DW2 testified that on 19 February 2004 at about 10pm the appellant came to his house to take his clothes. He saw someone in the appellant's car. DW3 testified that after the appellant was arrested by the police the appellant told her that there was another person in the car when he was arrested. Under cross-examination she said she informed PW7, the investigating officer, of Mohd Izuan's particulars. She tried to look for Mohd Izuan but she could not get in touch with him. DW5 testified that on 19 February 2004 he wanted to get a lift from the appellant to go back to Kulai. The appellant told him to wait for him at the Senai bus station. When he arrived at the Senai bus station at about 10.30pm he phoned the appellant and the appellant told him to wait for him there as the appellant wanted to send his friend to Taman Aman, Senai.

FINDINGS OF THE TRIAL JUDGE

[12] In his judgment the learned trial judge held that upon a maximum evaluation of the prosecution's evidence, the prosecution had proved actual possession against the appellant without the aid of the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the Act'). The learned trial judge then invoked the statutory presumption of trafficking under s 37(da) of the Act against the appellant. The appellant was ordered to enter his defence on the charge of trafficking.

[13] With regard to the appellant's defence the learned trial judge held that the defence was an afterthought which did not and could not raise a reasonable doubt on the prosecution's case. The learned trial judge held that the prosecution had proven the guilt of the appellant beyond reasonable doubt on the charge of trafficking and the appellant had not rebutted the statutory presumption of trafficking under s 37(da) of the Act.

[14] On the existence of Mohd Izuan the learned trial judge said:

> On the existence of Mohd Izuan nicknamed Setan it was the unsworn testimony of the accused that he picked Mohd Izuan at Kompleks Pasir Gudang and he saw Mohd Izuan holding a package and placing it on the rear passenger seat.
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> At the Kempas Toll Plaza car park he further testified that the police found the package under the driver's seat. However it is noteworthy that no explanation was proffered as to how the package placed on the rear passenger seat came to be found under the driver's seat. Another salient factor is that the Kempas Toll Plaza car park was under surveillance by the raiding party which enables them to see if there was Mohd Izuan or any other person getting out of the car and going into the toilet. Again the issue of Mohd Izuan's presence was never put to the investigating officer (SP7) during the prosecution's case and was only raised through the accused's wife SD3 at the defence stage wherein she stated that she raised the matter of Mohd Izuan with the IO which was denied by the IO who testified as a rebuttal witness at the defence stage. Again though the issue of Mohd Izuan was put at the prosecution's

stage through cross-examination of the raiding officer C/Insp Sekam a/k Anoi (SP4) and L/Kpl Md Zin bin Derus (SP6) nevertheless both denied same. Upon evaluating the defence testimony I am of the view that the accused have failed to discharge the evidential burden of creating a reasonable doubt. I have no reason to disbelieve the witness testimony of SP4, SP6 and SP7 who I find are credible witness. The prosecution's evidence that there was no other person except the accused when he was detained at the Kempas Toll Plaza car park remains.

THE APPEAL

[15] Before us, learned counsel for the appellant submitted that the learned trial judge had erroneously mishandled the facts and that the defence of the appellant was not adequately appreciated. Learned counsel discussed the issue into two parts, namely:

(a) that the learned trial judge erred when he unfairly criticised the defence; and

(b) that the learned trial judge erred when he failed to completely consider the defence.

[16] It was the contention of learned counsel that the learned trial judge had mishandled the defence case where aspects in favour of the defence were not appreciated. This misdirection had seriously prejudiced the appellant. According to learned counsel the learned trial judge failed to appreciate that the appellant had disclosed his defence about the existence of Mohd Izuan more than two years before the trial as in exh D17. Exhibit D17 is a letter dated 17 April 2004 sent by the appellant's counsel to the public prosecutor requesting the public prosecutor to reconsider the charge against the appellant on the ground that the drugs belonged to Mohd Izuan. On the existence of Mohd Izuan learned counsel referred to the evidence of DW2 who confirmed that on the night in question the appellant had come together with a friend in his car to collect his bag of clothes, the evidence of DW3 that when she visited the appellant after he was arrested the appellant told her there was another person in the car, the evidence of DW5 that on the night in question the appellant told him he had to send his friend back first to Taman Aman, Senai and lastly the evidence of DW6 that Mohd Izuan was a real person. These aspects of the defence evidence were not challenged by the prosecution. In support of that learned counsel for the appellant cited, inter alia, the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631.

DECISION

[17] On the existence of Mohd Izuan the learned trial judge did analyse the

A evidence adduced and did arrive at a finding. It was his finding that PW4, PW6 and PW7 were credible witnesses. It must be noted that PW4, PW6 and PW7 are police witnesses. Their evidence were not shaken by cross-examinations and as such their evidence were rightly accepted by the learned trial judge. In *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 Thomson CJ opined at p 258:

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> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

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[18] The raiding party arrived at the Kempas Toll Plaza car park at about 10.35pm and took their position near the public toilet of the Kempas Toll Plaza. The appellant arrived there later at about 11pm. So if Mohd Izuan was present PW4 could have seen him as the place was under his surveillance. The view of the trial judge as to the credibility of the witness must be given proper weight and consideration (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209). The principle of law governing appeals in criminal cases on questions of fact is well established, in that the appeal court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness (see *Lai Kim Hon & Ors v Public Prosecutor (see note at [1980] 2 MLJ x)* [1981] 1 MLJ 84 (FC)).

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[19] Under the circumstances we were unable to agree with the submission of learned counsel for the appellant that the learned trial judge had failed to appreciate the defence case. The learned trial judge had carefully and properly analysed all the available evidence presented by the defence and made specific findings of fact. The findings of the learned trial judge were based on essentially questions of fact and we saw no reason to disturb the findings. We also agreed with the learned trial judge that considering the totality of the evidence adduced by the appellant in his defence and weighing it against the prosecution's evidence the defence had failed to raise any reasonable doubt that the appellant was in possession of the cannabis found under the driver's seat of his car. The appellant had not also rebutted the statutory presumption of trafficking in the said drugs.

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[20] In the charge the offence was alleged to have taken place on 20 February 2004. However, the evidence show that the offence and the arrest took place on 19 February 2004. This issue was not raised in the court below or before us and the learned trial judge did not address this issue in his judgment. Notwithstanding that we were of the view that the error in the charge against the appellant had not occasioned a failure of justice. There was sufficient evidence to warrant the conviction. It is trite law that in a criminal case the duty of the court is to consider whether the conviction is right (see *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389).

[21] We had carefully scrutinised the evidence and on a consideration of the entire evidence we were satisfied that the appellant was rightly convicted. For the reasons given above the appellant's appeal was accordingly dismissed and the decision of the learned trial judge affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum